

STATE OF MICHIGAN  
IN THE SUPREME COURT

COUNTY ROAD ASSOCIATION OF MICHIGAN, a  
Michigan nonprofit corporation and CHIPPEWA  
COUNTY ROAD COMMISSION, a public body  
corporate,

Supreme Court Docket No. 125665

Plaintiffs-Appellants

Court of Appeals No. 245767

v

Trial Court No. 02-308-CZ

25665  
JOHN M. ENGLER, GOVERNOR OF THE STATE  
OF MICHIGAN; GREG ROSINE, DIRECTOR OF  
THE MICHIGAN DEPARTMENT OF  
TRANSPORTATION, MICHIGAN DEPARTMENT  
OF TRANSPORTATION; DUANE E. BERGER,  
DIRECTOR OF THE MICHIGAN DEPARTMENT  
OF MANAGEMENT & BUDGET, MICHIGAN  
DEPARTMENT OF MANAGEMENT & BUDGET;  
DONALD H. GILMORE, STATE BUDGET  
DIRECTOR; DOUGLAS B. ROBERTS, STATE  
TREASURER; MICHIGAN DEPARTMENT OF  
TREASURY; CANDICE S. MILLER, SECRETARY  
OF STATE; and MICHIGAN DEPARTMENT OF  
STATE,

Defendants-Appellees,

and

MICHIGAN PUBLIC TRANSIT ASSOCIATION,  
ANN ARBOR TRANSPORTATION AUTHORITY,  
SUBURBAN MOBILITY AUTHORITY FOR  
REGIONAL TRANSPORTATION, THE CAPITAL  
AREA TRANSPORTATION AUTHORITY,  
MICHIGAN ROAD BUILDERS ASSOCIATION and  
ASSOCIATION UNDERGROUND CONTRACTORS,

Intervenors-Appellants,

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**BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL**

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## QUESTION PRESENTED FOR REVIEW

- I. Const 1963, art 5, § 20 allows the Governor to reduce expenditures by Executive Order, except from constitutionally dedicated funds. Const 1963, art 9, § 9 dedicates all specific taxes, *except* general sales taxes, imposed on motor fuel and vehicles, to transportation purposes. It further provides that *not more* than 25% of the general sales tax revenue shall be used exclusively for comprehensive transportation purposes. Is the general sales tax revenue constitutionally dedicated within the meaning of art 5, § 20?

**COUNTER STATEMENT OF ORDER APPEALED FROM, GROUNDS,  
AND RELIEF SOUGHT**

The State Defendants-Appellees agree with the Statement Identifying Order Appealed From set forth in the Application for Leave to Appeal.

The State Defendants-Appellees do not agree with the Grounds for Application for Leave to Appeal set forth at p viii of the Application for Leave to Appeal. While the State Defendants agree that the Const 1963, art 9, § 9 is not ambiguous, it does not lend itself to the construction on which this appeal is based. Neither the history nor the plain language of art 9, § 9 supports the appeal. Intervenors-Appellants erroneously base their appeal on arguments that treat two entirely distinct parts of art 9, § 9 as if they shared the same history and purpose.

Given the conclusion reached by the Court of Appeals, this case presents no issue warranting review by this Court.

This case is particularly suited for granting peremptory relief. The meaning of the language of the constitution is easily discerned, as is its application to the case at hand. This Court should either deny the Application for Leave to Appeal, peremptorily affirm the conclusion reached by the Court of Appeals, or grant leave and, upon further consideration of the appeal, affirm the conclusion reached by the Court of Appeals.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents a question of constitutional construction. At issue is whether the Governor can reduce expenditures from appropriations of general sales tax revenue for comprehensive transportation purposes. Const 1963, art 5, § 20 requires the Governor to issue an Executive Order reducing expenditures, if actual revenue will fall below the estimates on which appropriations were based – exempting from that reduction mandate, "funds constitutionally dedicated for specific purposes":

No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. **The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes.**

The question at hand is whether the following words from Const 1963, art 9, § 9 constitutionally dedicate the described general sales tax revenue:

[N]ot more than 25 percent of the general sales taxes, imposed [on motor fuel and the sale of motor vehicles and parts] . . . shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law.

Appellants focus on the words "shall be used exclusively for the transportation purposes," to argue that the provision constitutionally dedicates general sales tax revenue.

The State directs attention to the words: "not more than 25 percent of the general sales taxes . . . shall be used," to show that the provision is one of limitation, not dedication. The provision limits the amount of the general sales tax revenue that may be appropriated for comprehensive transportation purposes. The constitution does not itself dedicate *any* portion of that general sales tax revenue for comprehensive transportation.

## **COUNTER STATEMENT OF PROCEEDINGS AND FACTS**

The first 16 pages of the Statement of Facts offered by Intervenor-Appellants (Intervenor) in their Application for Leave to Appeal (Application, pp 2-16) set forth a history of the funding of highways and bridges, and to a much lesser extent, public transportation, at the state level in Michigan. None of that represents a statement of the facts in this case, and, for the most part, it has no relevance to this appeal. By lumping historical funding for highways and bridges (for which all agree funds are constitutionally dedicated) with general sales tax funding for comprehensive transportation (as to which the question of dedication is the issue on appeal) Intervenor's Statement of Facts simply creates confusion. Less than a page, pp 17-18 of the Application, purports to state the facts relevant to this appeal, and even that is argumentative.

Defendants-Appellees (the State) offer the following counterstatement of facts and material proceedings.

On November 6, 2001 the Governor issued Executive Order 2001-9, the stated intent of which was to implement expenditure reductions in the amount of \$319,156,893 for the fiscal year 2001-2002, because actual revenues were falling short of revenue estimates by more than \$319,000,000. Pertinent to the instant appeal, the appropriation of general sales tax revenue for comprehensive transportation purposes was reduced by \$12,750,000. [Application, Ex E] As indicated on the face of the Executive Order, it was issued under the authority of Const 1963, art 5, § 20, following the procedures set forth in MCL 18.1391; it was submitted to, and approved by, the appropriations committees of the Michigan Senate and the Michigan House of Representatives. No one has questioned the fact that the Governor fully complied with the requirements of the constitution and statute in issuing Executive Order 2001-9.

On March 6, 2002, the instant action was commenced by the County Road Association of Michigan and the Chippewa County Road Commission (CRAM). A first amended complaint

(Complaint) was filed on March 20, 2002. The Complaint names the Governor, the Secretary of State, the State Budget Director, the Treasurer, the Directors of the Departments of Transportation and Management and Budget, and the Departments of Transportation, Management and Budget, Treasury, and State, as Defendants.

Counts I through III and Count V of the Complaint are not at issue in this appeal. In part, that aspect of the Complaint, relevant to CRAM rather than Intervenor, was the subject of a separate preliminary injunction from the trial court, a separate interlocutory appeal by the State, and a separate decision by the Court of Appeals, Docket No. 245931, issued January 13, 2004. The State has filed a Motion for Reconsideration of that decision, and that motion remains pending before the Court of Appeals.

Count IV of the Complaint is at issue in this appeal since Intervenor have limited their participation in this case to the allegations in Count IV. That count alleged that Executive Order 2001-9 wrongfully appropriated or transferred \$12,750,000 from the Comprehensive Transportation Fund (CTF) to the general fund. At issue is whether the Executive Order violated Const 1963, art 5, § 20.

On July 25, 2002, and September 23, 2002, respectively, stipulated orders were entered allowing the Michigan Public Transit Association, the Ann Arbor Transportation Authority, the Capital Area Transportation Authority, and the Suburban Mobility Authority for Regional Transportation to intervene as plaintiffs. On August 5, 2002, Intervenor filed a Complaint for Injunctive and Declaratory Relief. On September 30, 2002, Intervenor filed a First Amended Complaint containing one count that is identical to Count IV of the Complaint filed by CRAM.

On October 14, 2002, Intervenor filed an Application for Order to Show Cause Why a Preliminary Injunction Should Not Issue, with a supporting brief. On October 25, 2002, the

State filed a brief in opposition. The trial court heard oral argument on Intervenor's Application on October 30, 2002, and an Order Issuing Preliminary Injunction was entered on December 11, 2002. [Application, Ex B]

On January 2, 2003 the State filed an Interlocutory Application for Leave to Appeal to the Court of Appeals. The Court granted leave and issued a stay of the preliminary injunction.

After receiving briefs and hearing oral argument, the Court of Appeals issued its published opinion on January 13, 2004, Docket No. 245767 [Application, Ex A]. The Court upheld the validity of the Executive Order insofar as it reduced expenditures that had been appropriated for comprehensive transportation purposes in the amount of \$12,750,000. Intervenor's filed the instant Application for Leave to Appeal that decision, on February 24, 2004.

## ARGUMENT

- I. Const 1963, art 5, § 20 allows the Governor to reduce expenditures by Executive Order, except from constitutionally dedicated funds. Const 1963, art 9, § 9 dedicates all specific taxes, *except* general sales taxes, imposed on motor fuel and vehicles, to transportation purposes. It further provides that *not more* than 25% of the general sales tax revenue shall be used exclusively for comprehensive transportation purposes. That general sales tax revenue is not constitutionally dedicated within the meaning of art 5, § 20.**

**A. Standard of review**

Whether general sales tax revenue appropriated for comprehensive transportation purposes is "constitutionally dedicated for specific purposes," so as to be immune from an executive order reducing expenditures under Const 1963, art 5, § 20, presents a question of law. Questions of law are reviewed de novo. *In re MCI*, 460 Mich 396, 413; 596 NW2d 164 (1999).

**B. Preservation of the Question**

While Intervenors failed to set forth references to the record to show that they preserved this question for appeal, as required by MCR 7.302(A)(1)(e) and MCR 7.212(C)(7), the State acknowledges that the question was preserved. The State preserved this question by defending the constitutionality of Executive Order 2001-9 from the Intervenors' challenge in the trial court and the Court of Appeals.

**C. The history of transportation funding is largely irrelevant to this appeal**

Intervenors devote the first 16 pages of their Application to a discussion of the statutory and constitutional history of funding highways and bridges in Michigan. [Application, pp 2-16], stating:

The development and history of Const 1963, art 9, § 9 is important . . . because that history unequivocally demonstrates that the tax revenues to which it applies are constitutionally dedicated to highway and transportation purposes. [Application, p 2]

Intervenors commingled two entirely distinct categories of tax revenue and legal histories. There is no merit to the argument that the history of the specific taxes imposed on motor fuels and motor vehicles (gas tax and vehicle registration fees) is relevant to the general sales tax imposed on those items.

As will be set forth in this brief at pp 8-9, no one disputes that the specific taxes imposed on motor fuels and motor vehicles are constitutionally dedicated. At issue in this appeal is whether the general sales taxes that may be used for comprehensive transportation purposes are constitutionally dedicated. It is easily shown that the general sales tax revenue to which Const 1963, art 9, § 9 refers does not have a shared history and purpose with the specific tax revenue.

Intervenors note that a 1938 amendment to the 1908 constitution effected the first constitutional dedication of taxes for highway purposes. They quote the amendment, underlining words devoting the specific taxes. They did not, however, underline the words that are the antecedents of the words of Const 1963, art 9, § 9 involved in this appeal: "The provisions of this section shall not apply to the general sales tax . . . ." That history of the general sales tax reveals an intention to **not** constitutionally dedicate general sales tax revenue.

Intervenors' confusion of the treatment of the specific taxes, that are expressly dedicated, with general sales taxes, that are not, goes so far as to accuse the Court of Appeals of having violated the "purposes and intent" of the 1961 Constitutional Convention, despite the fact that the language in question did not come into existence until the 1978 amendment, 17 years later! "The Court of Appeals' construction of Const 1963, art 9, § 9 is clearly contrary to the purposes and intent of the delegates to the 1961 Constitutional Convention." [Application, p 31]

**D. Const 1963, art 5, § 20 authorizes expenditure reductions by Executive Order**

Const 1963, art 5, § 20 provides the authority for an executive order to reduce expenditures when a shortfall in revenue is predicted. But it expressly exempts from such a reduction, funds constitutionally dedicated for specific purposes:

No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law. **The governor may not reduce expenditures** of the legislative and judicial branches or **from funds<sup>1</sup> constitutionally dedicated for specific purposes.** [emphasis added]

**E. Const 1963, art 9, § 9 does not constitutionally dedicate any general sales tax**

Intervenors claim that Const 1963, art 9, § 9 constitutionally dedicates the general sales tax revenue appropriated for comprehensive transportation purposes. [Application, pp 20-26] The language of art 9, § 9 will not support that claim.

1. The plain and unambiguous meaning of art 9, § 9 must be enforced

Quoting *Traverse City School District v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), this Court set forth the relevant principles of constitutional construction in *Lapeer County Clerk v Lapeer Circuit Judges*, 469 Mich 146, 155; 665 NW2d 452 (2003):

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<sup>1</sup> One point should be noted for clarification, though it is not at issue in this appeal. The prohibition against reducing expenditures "from" funds constitutionally dedicated to specific purposes does not prohibit making expenditure reductions to, in effect, shift funds from one constitutionally permissible purpose to another – without, in any way, reducing overall expenditures for the constitutionally dedicated purposes – as part of an effort to balance the budget. Where general fund revenue had been appropriated to pay part of the "necessary collection expenses" under Const 1963, art 9, § 9, Executive Order 2001-9 could reduce those general fund expenditures, offsetting that reduction with dedicated funds appropriated for highways and bridges, in the amount necessary to pay the constitutionally permissible "necessary collection expenses." The purpose of Const 1963, art 5, § 20 is to assure that expenditures for constitutionally dedicated purposes are not reduced – not to freeze in place a *legislative* allocation among the dedicated purposes.

A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.' [Cooley's Const Lim 81].

adding:

Words must be given their ordinary meanings, and constitutional convention debates and the address to the people are relevant, although not controlling. *People v Nash*, 418 Mich. 196, 209; 341 NW2d 439 (1983) (opinion by BRICKLEY, J.). Further, every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another. *In re Probert*, 411 Mich 210, 232-233 n 17; 308 NW2d 773 (1981).

In *Silver Creek Drain District v Extrusions Division*, 468 Mich 367, 375 NW2d 436

(2003) this Court stated:

[I]n analyzing constitutional language, the first inquiry is to determine if the words have a plain meaning or are obvious on their face. If they are, that plain meaning is the meaning given them.

In the instant case, the words have a plain meaning that is obvious on the face of Const 1963, art 9, § 9.

2. Art 9, § 9 does not dedicate any general sales tax revenue

Art 9, § 9 addresses the disposition of various taxes and fees imposed on motor fuels and motor vehicles. The first paragraph *constitutionally* dedicates certain specific taxes and fees, after the payment of collection expenses, to “transportation purposes”:

All specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and to propel aircraft and on registered motor vehicles and aircraft shall, after the payment of necessary collection expenses, be used exclusively for transportation purposes as set forth in this section. [emphasis added]

The bolded language in that first paragraph expressly *excludes* general sales taxes from the “exclusive use” mandate. That is consistent with the history of constitutional dedication of motor fuel and vehicle tax revenue. As noted above, from the inception of constitutional dedication in 1938, general sales taxes have *never* been constitutionally dedicated for transportation purposes.<sup>2</sup>

The second paragraph of art 9, § 9 constitutionally dedicates at least 90% of the specific taxes to roads and bridges:<sup>3</sup>

Not less than 90 percent of the specific taxes, **except general sales** and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for the transportation purposes of planning, administering, constructing, reconstructing, financing, and maintaining state, county, city, and village roads, streets, and bridges designed primarily for the use of motor vehicles using tires, and reasonable appurtenances to those state, county, city, and village roads, streets, and bridges. [emphasis added]

The constitutional dedication of specific taxes in the first two paragraphs may be contrasted with the provision of art 9, § 9 relevant to this appeal, the third paragraph. Insofar as the impact of the Executive Order is concerned, the purpose of that third paragraph is precisely the opposite of a constitutional dedication; its purpose is to *limit* the general sales tax revenue that *may* be expended for comprehensive transportation purposes:

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<sup>2</sup> The 1938 amendment that added art 10, § 22 to the 1908 constitution to dedicate taxes on motor fuels and vehicles to highway purposes provided: "The provisions of this section shall not apply to the general sales tax . . . ." [Application, p 5]

<sup>3</sup> The taxes and fees described in the second paragraph are the same as those described in the first paragraph except that taxes and fees imposed on aircraft fuel and registration are excluded. One hundred percent of that aviation related revenue is dedicated, in the third paragraph, to comprehensive transportation purposes.

[1]<sup>4</sup> The balance, if any, of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles, after the payment of necessary collection expenses; [2] 100 percent of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel aircraft and on registered aircraft, after the payment of necessary collection expenses; and [3] **not more than 25 percent of the general sales taxes**, imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles, after the payment of necessary collection expenses; **shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law.** [emphasis added]

Thus, after the payment of collection expenses, this third paragraph of Const 1963, art 9, § 9, constitutionally dedicates, “exclusively for comprehensive transportation purposes as defined by law” three things: [1] any remaining portion of the taxes and fees described in the second paragraph, after at least 90% is allocated for roads and bridges; [2] 100% of the described taxes on aviation fuel and registration;<sup>5</sup> and [3] 0% of the general sales tax revenue. That is, in the case of general sales tax revenue, the plain words of the constitution provide that “not more than 25 percent of the general sales taxes . . . shall be used exclusively for . . . comprehensive transportation purposes.”

After completing their review of the history of Const 1963, art 9, § 9, Intervenors state:

Finally, a percentage of the revenue collected from the general sales tax on motor vehicle fuel, and parts and accessories, must also be used exclusively for comprehensive transportation purposes. *Id.* [Application, p 16]

There is no reasonable interpretation of art 9, § 9 that could mandate that some portion of the general sales tax revenue be dedicated to comprehensive transportation. Under the plain words of art 9, § 9, none of the general sales tax revenue is constitutionally dedicated. The Legislature

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<sup>4</sup> The bracketed numbers have been added to aid in separating the components of the third paragraph.

<sup>5</sup> By statute, the taxes and fees imposed on aviation fuel and registration are deposited in the Aeronautics Fund. See § 34 of the Aeronautics Code, 1945 PA 327, MCL 259.34.

is free to appropriate any amount, or no amount, up to 25%, for comprehensive transportation.

The certainty of that construction is shown by posing the simple question: If art 9, § 9 dedicates a portion of the general sales tax revenue, how much is dedicated?

The State agrees with Intervenor on one point, the relevant language of Const 1963, art 9, § 9 is "patently clear." [Application, p 22]

The State must disagree with the observation of the Court of Appeals:

We conclude that the language of art 9, §9 is ambiguous. It unequivocally exempts *all* general sales taxes from the restrictions imposed on specific taxes but then simultaneously subjects *up to twenty-five percent* of general sales taxes to the very same restrictions. [*County Road Ass'n of Michigan v Governor*, \_\_Mich App\_\_; \_\_NW2d\_\_ (2004)]

What the Court thereby identified may be inartful wording, but that does not make art 9, § 9 ambiguous; inartful wording is not synonymous with ambiguity. An analogy may be drawn from the principle of contractual construction: "[I]f a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous. . . ." *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1999). If it can be determined from a reading of art 9, § 9 that it does not dedicate a portion of general sales tax revenue for a specific purpose, that absence of a constitutional dedication must be honored – its meaning cannot be altered. *Pillon v Attorney General*, 345 Mich 536, 547; 77 NW2d 257 (1956).

Moreover, the constitutional *limit* on the use of general sales tax revenue for comprehensive transportation, in the third paragraph of art 9, § 9, does not contradict the express exclusion of general sales tax revenue from the listing of constitutionally dedicated revenue, in the first three paragraphs of art 9, § 9. The references to general sales tax revenue are fully harmonious; none of the revenue is dedicated.

**F. The General Sales Tax Act allocates less than 7% of the general sales tax revenue to comprehensive transportation**

Acting well within the limits imposed by the third paragraph of art 9, § 9, the Legislature provided that only 27.9% of 25% (or less than 7%) of the general sales tax revenue would be deposited in the CTF. The balance of the general sales tax revenue was to be deposited in the general fund. Thus, § 25(4)(a) of the General Sales Tax Act, 1933 PA 67 (GSTA), MCL 205.75<sup>6</sup>, provided:

(4) For the fiscal year ending September 30, 1988 and each fiscal year ending after September 30, 1988, of the 25% of the collections of the general sales tax imposed at a rate of 4% directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles by new and used car businesses, used car businesses, accessory dealer businesses, and gasoline station businesses as classified by the department of treasury remaining after the allocations and distributions are made pursuant to subsections (2) and (3), the following amounts shall be deposited each year into the respective funds:

(a) Not less than 27.9% to the comprehensive transportation fund. However, for the fiscal year ending September 30, 1991 only, the amount to be deposited in the comprehensive transportation fund shall be reduced by \$1,500,000.00.

(b) The balance to the state general fund. [MCL 205.75, emphasis added]

Section 25(4)(a) takes money that would otherwise go to the General Fund<sup>7</sup> to expend it for comprehensive transportation. Read together with §10b of 1951 PA 51, MCL 247.660b(1), and 2001 PA 59, MDOT's appropriations act, the expenditure authorized by §25(4)(a) represents an expenditure authorized by appropriation that is subject to reduction under Const 1963, art 5,

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<sup>6</sup> This 27% formula only applies to 25% of 4% of the 6% general sales tax that is actually imposed, and the statutory description of the subjects of the tax is not identical to the description in the third paragraph of art 9, § 9. But none of that detail is material to this appeal. Also, 2003 PA 139 amended MCL 205.75, but the amendment is not relevant to this appeal concerning fiscal year 2001-2002.

<sup>7</sup> Section 25(1) of the GSTA, MCL 205.75 provides: "All sums of money received and collected under this act shall be deposited by the department in the state treasury to the credit of the general fund, except as provided in this section."

§ 20.<sup>8</sup> Once reduced by Executive Order 2001-9, the dollar amount of that reduction either remains in the General Fund, or it is deposited back in the General Fund under §25(4)(b).

**G. The general sales tax revenue was not *transformed* into “constitutionally dedicated” funds**

The State must also disagree with an argument made by the Intervenors, and preliminarily validated by a statement by the Court of Appeals:

According to the plain language of art 9, § 9, no more than twenty-five percent of the general sales taxes "shall" be "exclusively" used for comprehensive transportation purposes, while the remaining balance goes to the state general fund. It is well established that the use of the word "shall" rather than "may" indicates a mandatory, rather than discretionary, action. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 318; 596 NW2d 591 (1999). The word "exclusive" means "limited to that which is designated." *Random House Webster's College Dictionary* (1997). Thus, **this part of the language of art 9, § 9, provides that once the Legislature apportions a certain percentage not exceeding twenty-five percent of the general sales tax to the CTF, the funds shall be used exclusively for comprehensive transportation services.** [*County Road Ass'n of Michigan v Governor*, \_\_Mich App\_\_; \_\_NW2d\_\_ (2004), emphasis added]

Subsection 25(4)(a) of the GSTA takes money that bears no constitutional restriction whatsoever on its use, to *statutorily* allocate those funds; it does not, and could not, *constitutionally* dedicate the general sales tax revenue. There is no language in art 9, § 9 to suggest that the act of appropriation transforms the general sales tax revenue into *constitutionally* dedicated revenue.

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<sup>8</sup> Const 1963, art 5, § 20 provides that the Governor "shall reduce expenditures authorized by appropriations." MCL 247.660b(1) provides, in part, for the appropriation of those funds: "[T]he money authorized to be credited to the comprehensive transportation fund pursuant to section 25 of the general sales tax act, . . . is appropriated to the state transportation department for the purposes described in section 10e." 2001 PA 59 appropriates that portion of the CTF not appropriated by Act 51. MCL 205.75(4)(a) relates to the same subject and has a common purpose with those laws; they represent part of a comprehensive system for collecting and appropriating taxes and fees for transportation purposes. They are to be read *in pari materia*. See *County Road Ass'n v Board of Canvassers*, 407 Mich 101, 118-119; 282 NW2d 774 (1979).

Art 9, § 9 expressly addresses the "use" of the revenue, placing a constitutional limit on the amount of the described general sales tax revenue that may be "used" for comprehensive transportation purposes. So long as no more than 25% of this general sales tax revenue is used for comprehensive transportation purposes, the language of the constitution has not been violated.

Intervenors acknowledge that the Legislature has the authority to reduce the amount of the general sales tax revenue that is appropriated for comprehensive transportation, even **after** it has enacted a law allocating a specific portion of that revenue to the comprehensive transportation fund:

Confronted with fiscal challenges facing the State in 1991, the Legislature enacted House Bill 4268, 1991 PA 70, amending MCL 205.75 to provide for a one year reduction in the amount of motor vehicle sales tax revenue to be allocated to the CTF.

\* \* \*

Obviously, the State knows how to properly and constitutionally reduce the funds to be deposited into the CTF." [Application, p 36, emphasis supplied]

If subsection 25(4)(a) of the GSTA had the effect of constitutionally dedicating that revenue, it would be beyond the power of the Legislature to alter it. *Pillon v Attorney General, supra*, 345 Mich at 547.

Intervenors' acknowledgement merely highlights the lack of merit in their appeal. Statutory appropriations do not insulate appropriated funds from subsequent reduction. Section 202 of 2001 PA 59, the Act appropriating funds to the CTF, provides: "The appropriations authorized under this act are subject to the management and budget act, 1984 PA 431, MCL 18.1101 to 18.1594." Section 392 of the Management and Budget Act, 1984 PA 431, MCL 18.1101 *et seq* provides:

This act shall not be construed to prohibit the legislature from reducing line item appropriations in budget acts in subsequent legislation. [MCL 18.1392]

Appropriations remain subject to change, including reduction. That fact is confirmed by Const 1963, art 5, § 20: “No appropriation shall be a mandate to spend.”

An argument similar to that made by Intervenors was made by the plaintiffs in *Michigan Ass’n of Counties v Dep’t of Management and Budget*, 418 Mich 667, 673-674; 345 NW2d 584 (1984):

The basis of plaintiffs’ argument is that the State Revenue Sharing Act, coupled with 1939 PA 301 and 1967 PA 281, establishes comprehensive self-executing and self-balancing systems for the collection of specific taxes and the appropriation of a portion of those funds to local units of government. Plaintiffs contend that this statutory distribution scheme is outside the normal appropriation process, and, therefore, not subject to Const 1963, art 5, § 20.

It is true that the plaintiffs in that case did not argue that the funds in question were constitutionally dedicated, but like the Intervenors’ reliance on MCL 205.75(4)(a), the plaintiffs argued that a statutory appropriation insulated the funds from an expenditure reduction order. A good deal of the Court’s analysis is relevant to the instant case.

Quoting *Oakland Schools Bd of Ed v Superintendent of Public Instruction*, 392 Mich 613, 620-621; 221 NW2d 345 (1974), the Court explained the nature of the annual appropriation process and the need for the Governor and Legislature to retain the authority to match revenue with expenditures:

The Michigan Constitution of 1963 brought to this state new measures designed to require an annual review of the budget and to provide for annual fiscal accountability in both the legislative and executive branches. See, Const 1963, art 4, § 31 and art 5, § 18 and the 'Convention Comment' accompanying each section. To construe 1970 PA 100, § 16a(5) as urged by appellee would violate the spirit if not the letter of these constitutional provisions. The Legislature would be, in effect, appropriating in advance of its ability to accurately forecast available revenues and would thereby be unable to match revenue with appropriations as required by Const 1963, art 4, § 31. In addition, such prospective appropriations would force the Governor to approve or veto the expenditure far in advance of his ability to assess the fiscal needs of the state. See generally, Const 1963, art 5, §§ 18 and 19. We do not believe that the Legislature intended either of these results. [418 Mich at 675-676]

The Court rejected the notion that, by such legislation alone, general fund revenue could be exempted from Const 1963, art 5, § 20:

n9 Appellants argue that only general fund-general purpose expenditures may be reduced pursuant to art 5, § 20, reasoning that the constitutional budgetary provisions accompanying this section at convention consideration used the terms "general appropriation bill". Article 4, § 31, however, requires "an itemized statement of estimated revenue by major source *in each operating fund* for the ensuing fiscal period". This language obviously contemplates that there will be more than one operating fund, refuting appellants' contention that by "general appropriation bills", the constitution means only those appropriations related to the general purpose fund. Moreover, **art 5, § 20 authorizes reductions in "expenditures authorized by appropriations" without reference to "general appropriation bills" or to any other limiting language.**<sup>9</sup> [418 Mich at p 683, emphasis added]

The Legislature has full authority to appropriate any – or none – of the subject general sales tax revenue for comprehensive transportation purposes, up to 25%. Nothing in the language of any provision of the constitution empowers the Legislature to transform the character of those funds, by the mere act of appropriation, into “funds *constitutionally* dedicated for specific purposes.

**H. The Executive Order does not violate a self-executing feature of Const 1963, art, 9 § 9**

Intervenors make an argument (Application, pp 26-27) that the Executive Order is an “illegal imposition of additional burdens on art 9, § 9, which is a self-executing constitutional provision.” Intervenors do not explain how the portion of the third paragraph of art 9, § 9, having to do with general sales tax revenue, is self-executing. It is plain beyond dispute that, absent a legislative appropriation, none of that revenue could be spent for comprehensive

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<sup>9</sup> Despite the fact that the issue has been settled, Intervenors resurrect the very same discredited argument in their Application for Leave to Appeal, pp 33-34: "Const 1963, art 5, § 20 only grants the Governor the power to "amend" the general appropriations bills."

transportation.<sup>10</sup> The only aspect of art 9, § 9 that might, in any sense of the word, be self-executing, would be the provisions constitutionally dedicating the described specific taxes.<sup>11</sup>

Intervenors quoted an excerpt from *Wolverine Golf Club v Hare*, 24 Mich App 711; 180 NW2d (1970) to support their claim. The excerpt provides that the Legislature may not, by legislation, curtail or place undue burden, on self-executing constitutional provisions. (Application, p 26) But that begs the question. The language from *Wolverine* immediately following the excerpt quoted by Intervenors, makes clear that the language of art 9, § 9 at issue is not a self-executing provision:

Whether a constitutional provision is self-executing is largely determined by whether legislation is a necessary prerequisite to the operation of the provision. [24 Mich App at 725]

Nothing within art 9, § 9 purports to state how much of the general sales tax revenue shall be used for comprehensive transportation purposes. In the words of *Wolverine*, legislation is a necessary prerequisite to the operation of the provision.

Intervenors also cite *County Road Ass'n of Michigan v Board of State Canvassers*, 407 Mich 101, 120; 282 NW2d 774 (1979) for the proposition that Const 1963, art 9, § 9 and 1951 PA 51, MCL 247.51 *et seq* are “self-executing.” What Intervenors fail to note, is that the Court’s reference to “self-executing” was in relation to the first paragraph of Const 1963, art 9, § 9, having to do with the specific taxes – a paragraph not at issue in this appeal:

In addition, Const 1963, art 9, § 9, n6 and 1951 PA 51, as amended, are self-executing and make transportation tax legislation unique.

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<sup>10</sup> Thus, Const 1963, art 9, § 17 provides: "No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

<sup>11</sup> This appeal does not present a need to address whether, or to what extent, the provisions of art 9, § 9 concerning specific taxes may be self-executing, and the State does not address that issue.

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n6 All specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for highway purposes as defined by law. [407 Mich at p 119, fn 6]

Intervenors cite *County Road Ass'n of Michigan v Dep't of Transportation*, 94 Mich App 242; 288 NW2d 382(1979), stating: “[t]he present circumstances are nearly identical: the State Defendants may not use CTF funds (because they are constitutionally dedicated) for any other purpose . . . .” [Application, p 28]. But that case did not purport to address use of general sales tax revenue:

Plaintiffs brought this original proceeding for mandamus, pursuant to MCL 600.4401; MSA 27A.4401, to prevent defendant Michigan Department of Transportation from financing a vehicle testing program with funds derived from fuel and weight tax revenues. [94 Mich App at 243, emphasis added]

Intervenors clearly erred when they cited that case *as if* it supported their claim that the *general sales tax revenue* is constitutionally restricted to use for comprehensive transportation:

[T]he Court of Appeals held that the language of Const 1963, art 9, § 9 limits the use of the specified funds to the specific transportation purposes listed therein. *Id.* at 247. The restricted funds may be used only for those purposes set forth therein or for comprehensive transportation purposes as defined by law. *Id.*

\* \* \*

All of the funding for the CTF is constitutionally dedicated. [Application, p 28, emphasis supplied]

#### **I. The Executive Order must be construed to effectuate its purpose**

Intervenors argue that the Executive Order cannot be upheld as a reduction of expenditures for comprehensive transportation, because it purports to amend MCL 205.75(4)(a) without complying with Const 1963, art 4, §§ 1, 26 and 33, the enactment and presentment requirements. (Application, pp 32-35). For purposes of the instant case, we make no argument that a statute may be amended by an Executive Order under Const 1963, art 5, § 20, except, of

course, to the extent that a statute authorizing expenditures may have those statutory expenditures reduced.

This is more a matter of semantics, than a matter of law. If a statute purports to authorize the expenditure of a stated sum and an Executive Order reduces that sum, the Order has a practical and legal effect on the statute. But the case at hand is too important to allow its outcome to turn on an esoteric dispute over legislative procedure – or an argument that elevates form over substance.

The rules of construction applicable to statutes apply to the construction of Executive Orders. *Soap & Detergent Ass’n v Natural Resources Comm*, 415 Mich 728, 756-757, 764; 330 NW2d 346 (1982). Even if the Order could not “amend” MCL 205.75(4)(a), the express purpose and intent of the Order must be enforced. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The Order must be construed as constitutional unless the unconstitutionality clearly appears. *Straus v Governor*, 459 Mich 526, 534; 592 NW2d 53 (1999). If it can be given two different interpretations, one of which is constitutional and the other unconstitutional, it should be given the interpretation that makes it constitutional. *State Bar of Michigan v City of Lansing*, 361 Mich 185, 195; 105 NW2d 131 (1960).

The bolded language in the following excerpt from Executive Order 2001-9 makes clear that the language referring to an amendment of MCL 205.75(4)(a) was simply a means of expressing the intent to reduce expenditures.<sup>12</sup> Moreover, had the Order made the same reductions, with no reference whatsoever to MCL 205.75(4)(a), the practical and legal effect would be the same. The amount of the expenditures for comprehensive transportation would be reduced by \$12,750,000.00:

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<sup>12</sup> Intervenor’s agreed that “the stated intent” of the Executive Order was “to implement expenditure reductions.” (Application, p 17)

NOW, THEREFORE, I, John Engler, Governor of the State of Michigan, pursuant to the authority vested in me by the Michigan Constitution of 1963 and the laws of the State of Michigan, and with the approval of a majority of members of each appropriations committee, **do hereby order the following reductions:**

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b. Comprehensive Transportation Fund

**Distribution of the 25 percent** of the collections of the general sales tax imposed at a rate of 4 percent directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles by new and used car businesses, used car businesses, accessory dealer businesses, and gasoline station businesses as classified by the Department of Treasury in accordance with 1933 PA 167, being Section 205.75 of the Michigan Compiled Laws, **is reduced by amending Section 25 as follows:**

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(a) Not less than 27.9% to the comprehensive transportation fund. However, for the fiscal year ending September 30, 1991 only, the amount to be deposited in the comprehensive transportation fund shall be reduced by \$1,500,000.00. FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2002, **THE AMOUNT TO BE DEPOSITED IN THE COMPREHENSIVE TRANSPORTATION FUND SHALL BE REDUCED BY \$12,750,000.00** AND THAT AMOUNT SHALL BE TRANSFERRED TO THE UNAPPROPRIATED BALANCE OF THE GENERAL FUND FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2002. **THE FOLLOWING COMPREHENSIVE TRANSPORTATION FUND ACCOUNTS ARE REDUCED BY \$12,750,000.00** FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2002:

72000 - ADMINISTRATION (\$200,000)  
75170 - LOCAL BUS OPERATING (\$3,247,300)  
78120 - FREIGHT PROPERTY MANAGEMENT (\$119,300)  
79030 - DETROIT/WAYNE COUNTY PORT AUTHORITY (\$31,500)  
74050 - INTERCITY BUS EQUIPMENT (\$1,000,000)  
77610 - RAIL PASSENGER SERVICE (\$78,000)  
78430 - RAIL INFRASTRUCTURE LOAN PROGRAM (\$800,000)  
77400 - INTERCITY BUS SERVICE DEVELOPMENT (\$100,000)  
79050 - MARINE PASSENGER SERVICES (\$500,000)  
77090 - TERMINAL DEVELOPMENT (\$200,000)  
75260 - SPECIALIZED SERVICES (\$190,000)  
75200 - BUS CAPITAL (\$378,900)  
75210 - BUS PROPERTY MANAGEMENT (\$60,000)  
76190 - SERVICE DEVELOPMENT AND NEW TECHNOLOGY (\$155,000)  
76180 - PLANNING GRANTS (\$40,000)  
75220 - AUDIT SETTLEMENTS (\$50,000)  
75230 - REGION SERVICE COORDINATION (\$900,000)  
75300 - WORK FIRST INITIATIVE (\$1,500,000)

3078 - RAIL INFRASTRUCTURE LOAN PROGRAM - RESERVE FOR  
REVOLVING LOAN PROGRAMS (\$3,200,000)

If the language of the Executive Order that purports to amend MCL 205.75(4)(a) violates Const 1963, art 4, §§ 26 and 33, that language (italicized in the above excerpt: “*by amending Section 25*”) may be disregarded as superfluous. While language is not ordinarily disregarded as superfluous, it is entirely appropriate that it be, where to do so eliminates a constitutional cloud, and does so in full accord with the express and undisputed purpose of the executive order – to reduce expenditures.

The disputed language may also be severed from the Executive Order – leaving its manifest intent and purpose intact, under MCL 8.5. As stated in *Blank v Dep’t of Corrections*, 462 Mich 103, 122-123, 130; 611 NW2d 530 (2000), that provision requires such severance if invalid language may be disregarded to give effect to the order:

If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end are declared to be severable.

Intervenors assert that the severance doctrine was not raised in the State’s brief below:

"the State Defendants only argued that the Trial Court should read it in such a way to render it constitutional." [Application, p 35]. The severance doctrine is just one principle of statutory construction to support the argument for construing a law, where possible, in a manner that preserves its validity. An Executive Order “is entitled to the same presumption of constitutionality that an equivalent statute would enjoy.” *Straus, supra*, at 534. The “issue” that needed to be preserved was the State’s claim that the Order constitutes a valid reduction of expenditures and must be construed as such. The fact that the severance doctrine was not specifically cited, does not constitute a failure to preserve the issue. It would be an odd and

entirely novel state of affairs if an appellate brief could not be more thorough than a trial brief.

Indeed, even if the parties do not cite a particular authority, the court may do so *sua sponte*. This notion was expressed in Justice Corrigan's concurring opinion, in an decision denying a motion for rehearing:

Moreover, this Court is not constrained to simply adopt the reasoning advanced by one of the parties. If our research leads to a different line of reasoning that correctly resolves the issues presented, we are not obliged to reject the correct view merely because neither party has proposed it. As long as we address the particular issue presented, the theories that our research uncovers in an attempt to decide the issue are properly before this Court. [*Mack v City of Detroit*, 467 Mich 1212; 654 NW2d 563 (2002)]<sup>13</sup>

Intervenors cited no law for the proposition that, where a party argues that a law should be construed so as to preserve its validity, every principle of statutory construction favoring such a ruling must be cited to the trial court or be deemed waived. Intervenors direct the Court's attention to *Manning v City of East Tawas*, 234 Mich App 244, 247, n 2; 593 NW2d 649 (1999) and *Grand Blanc Cement Products, Inc v Insurance Co of North America*, 225 Mich App 138, 149; 571 NW2d 221 (1997). But they cited no language from either case to show how it supports their position. Both cases concern circumstances in which an issue, not merely an argument, was not raised below. By failing to set out any supporting authorities for their claim of error, Intervenors have abandoned it. MCR 7.302(A)(1)(e) and 7.212(C)(7). In the oft-repeated words of *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then

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<sup>13</sup> In *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000) this Court supplied a relevant and missing citation: "We note that neither party cited the correct court rule, given the status of this case." In *Judicial Attorneys Ass'n v State of Michigan*, 460 Mich 590, 597; 597 NW2d 113 (1999) this Court was not deterred from addressing a key issue, recognized by neither party: "However, there is an underlying issue that neither the parties nor the Court of Appeals explicitly addressed . . . ."

search for authority either to sustain or reject his position. . . Failure to brief a question on appeal is tantamount to abandoning it.

Even if the State had failed to raise the point, it is a point of law that justice requires be resolved. It was entirely appropriate for the Court of Appeals to hold:

If a portion of an act is invalid, a court should enforce the remainder to the extent that it can be given effect consistent with the legislative intent underlying the act.

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Given the obligation to construe the executive order as constitutional if possible, it would make no sense to invalidate the entire provision merely because it may have been inartfully phrased. Thus, we conclude that this does not invalidate the reductions at issue. [*County Road Ass'n of Michigan v Governor*, \_\_Mich App\_\_; \_\_NW2d\_\_ (2004)]

See, *Joe Panian Chevrolet Inc v Young*, 239 Mich App 227, 233; 608 NW2d 89 (2000), "[T]his Court may address an unpreserved issue if it is one of law for which all the necessary facts were presented." Accord, *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 57; 602 NW2d 215 (1999),

## CONCLUSION

In summary, in times of fiscal distress, general sales tax revenue legislatively appropriated to the comprehensive transportation fund is subject to an expenditure reduction order under Const 1963, art 5 § 20. There exists no reasonable construction of Const 1963, art 9 § 9 under which those funds could be characterized as constitutionally dedicated to specific purposes. The Legislature and the Governor, not the terms of the constitution, determine whether any of that revenue, up to a maximum of 25%, is to be used for comprehensive transportation purposes. Moreover, there are no words in art 9 § 9 that could support a notion that, once a law has been enacted appropriating a portion of that general sales tax revenue to the comprehensive transportation fund, that revenue is transformed into constitutionally dedicated funds. Art 9, § 9 could not be more clear – the specific taxes imposed on motor fuel and motor vehicles are constitutionally dedicated to transportation purposes; general sales tax revenue is not.

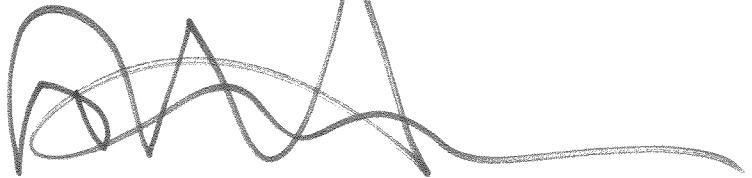
**RELIEF**

WHEREFORE, the State asks that this Honorable Court deny the Intervenor's Application for Leave to Appeal, or peremptorily affirm the conclusion of the Court of Appeals that the portion of Executive Order 2001-9 pertaining to comprehensive transportation funds, is valid, or grant leave and upon further consideration, affirm that conclusion reached by the Court of Appeals.

Respectfully Submitted,

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A handwritten signature in dark ink, appearing to be 'Patrick F. Isom', written over a horizontal line.

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